

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

19509

FILE: B-201418

DATE: September 22, 1981

MATTER OF: Kenneth M. Smith - Temporary Quarters
Subsistence Expenses

DIGEST: Employee may not be reimbursed for temporary quarters subsistence expenses for the period beginning July 17, 1979, where family departed residence in Dallas, Texas, on that date to travel to new duty station in Tyler, Texas, and subsequently reoccupied Dallas residence on August 22, 1979. Paragraph 2-5.2c of the Federal Travel Regulations requires that the employee's former residence be vacated as a condition of entitlement to temporary quarters subsistence expenses. Employee has not provided sufficient evidence to establish that his family intended to vacate residence on July 17, 1979.

The Internal Revenue Service requests our decision concerning the entitlement of Kenneth M. Smith to temporary quarters subsistence expenses. The question is raised because of doubt as to when Mr. Smith's family vacated their residence at the former duty station.

Mr. Smith was transferred from Dallas, Texas, to Tyler, Texas, effective February 5, 1979. His residence in Dallas was offered for sale but his family continued to occupy it until July 17, 1979. On that date, they joined Mr. Smith in Tyler. From August 6 through August 18, he was detailed to Dallas on temporary duty. It appears that his family returned to Dallas with him and that they occupied their residence there.

Upon the conclusion of the temporary duty assignment on August 18, Mr. Smith and his family returned to Tyler and searched for suitable housing. Mr. Smith eventually rented quarters for himself from his parents while his family returned to Dallas on August 22, 1979, and reoccupied their residence. Although there is no indication when a sales contract was obtained on Mr. Smith's home in Dallas,

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settlement did not take place until June 16, 1980. His household effects were shipped on a Government Bill of Lading during that same month, and his family then moved to Tyler.

The Internal Revenue Service (IRS) concluded that the residence at the old duty station had not been vacated until June 1980, and denied the claim for temporary quarters subsistence expenses for the period beginning July 17, 1979. Mr. Smith has reclaimed. He points out that he listed his house for sale in April 1979, that he reduced the sales price in July 1979, and that he located a new residence in Tyler but could not settle until his residence in Dallas was sold. He believes that these facts evidence the intent of his family to vacate their residence on July 17, 1979.

The sole issue presented is whether the Smith's residence in Dallas was vacated within the meaning of that term as used in Federal Travel Regulations (FTR) (FPMR 101-7, May 1973), paragraph 2-5.2c. That paragraph defines "temporary quarters" as lodging occupied temporarily by the employee or members of his immediate family who have vacated the residence quarters in which they were residing at the time the transfer was authorized. When a family moves out of their residence at the employee's former duty station and takes up temporary quarters only to later reoccupy that residence, a question is justifiably raised as to when it was vacated within the meaning of FTR paragraph 2-5.2c. In determining when a residence was actually vacated this Office has given great weight to the intent of the employee and his family and to the particular facts involved in each case. 47 Comp. Gen. 84 (1967); Charles C. Werner, B-185696, May 28, 1976. However, the burden is on the employee to provide convincing evidence of his intent. David R. McVeigh, B-188890, November 30, 1977.

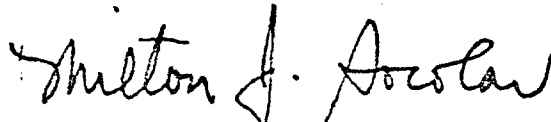
In the present case, Mr. Smith has not met that burden. The facts that he has presented do not support a conclusion that his family intended to vacate their residence in Dallas on July 17, 1979. In fact, the reason that his family returned to Dallas in August 1979 was apparently related to the difficulties encountered in selling their residence there.

Similar facts were involved in the case of John M. Mankat, B-195866, April 2, 1980. In that decision an employee's family joined him at the new duty station in July 1977, but returned to the former duty station within a week. Basically, their decision to return to the house at the former duty station was due to uncertainties surrounding the sale of that residence. This Office denied that claim because the record did not support the employee's contention that his family's intent was to vacate the residence in July 1977.

Furthermore, we note that the evidence submitted by Mr. Smith only indicates his intent to relocate his family at some future date upon the sale of his residence. The facts do not support a finding that his family intended to vacate their Dallas residence on July 17, 1979.

Finally, we note that the facts of this decision resemble those of a decision recently issued, also involving an IRS employee. In Patrick T. Schluck, B-202243, August 14, 1981, we found that the employee was entitled to temporary quarters subsistence expenses where his family joined him in temporary quarters at his new duty station for 10 days, but moved back into the former residence following the cancellation of a contract to purchase a new residence. However, the Schluck decision contained several factors not present here. For instance, in Schluck, the employee had a contract of sale on his former residence, purchased a residence at his new duty station, made arrangements to have his household goods shipped, and made immediate arrangements to purchase a new residence when he was forced to cancel the first contract. The weight of these factors in combination carried the burden of proof incumbent upon Mr. Schluck, and distinguishes his case from that of Mr. Smith.

On the basis of the above, we hold that Mr. Smith has not provided sufficient evidence to prove that his family intended to vacate the Dallas residence on July 17, 1979. Accordingly, his claim for temporary quarters subsistence expenses may not be allowed.



Acting Comptroller General
of the United States